No. 84-1049

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In The Supreme Court Of The United States

October Term, 1984

ROBERT WALTER GOVERN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS FOR REVIEW

1. Whether properties merely "used in furtherance" of an enterprise on one occasion are properly subject to forfeiture as "affording a source of influence over" that enterprise under 18 U.S.C. §1963(a)(2).

2. Whether too-liberal admission of out-of-court statements by alleged coconspirators under Rule 801(d)(2)(E), Federal Rules of Evidence, violates the Confrontation Clause.

3. Whether the manner in which the Government prosecuted this case violated due process.

4. Whether a defendant is entitled to a hearing to establish the factual basis for a double jeopardy claim, where there is substantial evidence before the trial court that the

prosecutor may have caused or intended to cause a mistrial.

5. Whether a "RICO" prosecution under 18 U.S.C. 1961 et seq. may properly lie where the alleged "enterprise" does not involve a diverse pattern of crimes or have any ascertainable structure.

OTHER PARTIES BELOW

Other parties to this case in the Court of Appeals were petitioner GOVERN's co-defendants, Chan Walker Zielie, Keith H. Gustafson, Thomas David Wilkerson, and Leon D. Mausser. Their petitions for rehearing before the Court of Appeals were denied several weeks prior to petitioner GOVERN's, and they are not seeking review before this Court.

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No.

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ROBERT WALTER GOVERN,
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

OPINIONS BELOW

The Court of Appeals' decision appears at 734 F.2d 1447, and in the Appendix to this petition.

None of the orders or opinions of the District Court were reported. The trial court's order and amended order denying petitioner's motion to dismiss on grounds of double jeopardy, its order relating to admissibility of cocon-

spirator statements, and its order denying petitioner's post-trial motions all appear in the Appendix attached hereto.

JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on June 25, 1984. A timely petition for rehearing and suggestion for rehearing for en banc were filed, and denied by Order dated August 6, 1984. Petitioner's motion to stay or recall issuance of mandate was denied and the mandate issued on August 27, 1984.

This petition for certiorari is filed within 60 days of the last order of the Court of Appeals addressed to this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

U.S. CONST. amend. VI, cl. 5

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;

U.S. CONST. amend. V, cl. 3

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

18 U.S.C. §1962(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §§ 1961(1)(D), (4) & (5)

(1) "Racketeering activity" means

(D) Any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under the law of the United States.

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "Pattern of Racketeering Activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. §1963(a)(2)

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States

(2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

18 U.S.C. §3563

No conviction or judgment shall

work corruption of blood or any forfeiture of estate.

Rule 801(d)(2)(E), Federal Rules of Evidence

(d) "Statements which are not hearsay". A statement is not hearsay if

(2) "Admission by party-opponent". The statement is offered against a party and is

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Defendant GOVERN, petitioner herein, was charged in an 18-count indictment with numerous substantive counts of marijuana possession, conspiracy, racketeering, and tax fraud, all arising out of what the Government described as "a basic drug conspiracy." The first

trial of the case ended in a mistrial after an improper reference by a Government witness to an unrelated homicide which the Government had previously recognized would result in incurable prejudice. The defendant requested a brief examination of the witness to determine whether the Government had caused a mistrial, but the trial court refused and denied a motion to dismiss on double jeopardy grounds.

During the first trial, the Government sought to introduce over defense objection a number of out-of-court statements by alleged coconspirators without first establishing the predicates for their admissibility under Rule 801(d)(2)(E), Federal Rules of Evidence. Accordingly, the court directed that a hearing be conducted pursuant to United States v. James,

590 F.2d 575(5th Cir. 1979)(en banc) prior to the second trial. At that hearing, over defense objection, the Government presented statements of absent alleged coconspirators in order to establish their admissibility under Fed.R.Evid. 801(d)(2)(E). The Government was then permitted to introduce 126 out-of-court statements of questionable reliability at the second trial. Judgments of acquittal were entered on two counts against defendant GOVERN, and the jury returned verdicts of guilty of the remaining counts, and verdicts of criminal forfeiture on 4 parcels of real property. Three of these parcels were forfeited pursuant to a jury instruction, over defense objection, that properties "used in furtherance" of a RICO enterprise "afford a source of influence" over that enterprise under 18 U.S.C.

§1963(a)(2).

Among the real properties forfeited was petitioner GOVERN's personal residence in Winter Park, Florida, under the theory that it had been "contributed" to a criminal enterprise. There was no evidence whatever linking the house to any unlawful enterprise other than a single alleged delivery of money to defendant GOVERN at that location.

The so-called "enterprise" was an amorphous group of, as the Government described it, "hundreds of people" who were engaged in marijuana distribution at one time or another. There was no showing of any diverse pattern of crimes or of any structure other than that necessary to accomplish the single underlying predicate offense of marijuana distribution.

On appeal, the Eleventh Circuit

affirmed the convictions and forfeitures against petitioner GOVERN except on Count 12, which the Government conceded was not supported by any evidence.

REASONS FOR GRANTING THE WRIT

1. THE CRIMINAL FORFEITURES ENTERED UNDER COUNT 2 OF THE INDICTMENT ARE INVALID.

Judgments of criminal forfeiture were entered against petitioner GOVERN under Count 2 of the indictment as to three parcels of real property, including his residence in Winter Park, Florida. These judgments were entered on jury verdicts predicated on an instruction over defense objection that properties "used in furtherance" of a criminal enterprise are subject to forfeiture under 18 U.S.C. §1963(a)(2).

This instruction has no support in the case law or the language of the statute. Count 2 of the indictment and

affirmed the convictions and forfeitures against petitioner GOVERN except on Count 12, which the Government conceded was not supported by any evidence.

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This instruction has no support in the case law or the language of the statute. Count 2 of the indictment and

18 U.S.C. §1963(a)(2) speak of interests or property rights "affording a source of influence" over a RICO enterprise. This had been interpreted to mean an "ownership or investment type of interest" in a racketeering enterprise, United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), and there is no basis whatever for extending RICO's forfeiture provisions to property which, on one or more occasions, has been merely used to further the affairs of an enterprise.

The Eleventh Circuit's ratification of this unprecedented expansion of criminal forfeiture violates the principle of lenity under which criminal statutes are to be strictly construed, and revives the medieval penalty of forfeiture of estate, contrary to 18 U.S.C. §3563 and Article III, Section 3 of the United States Constitution.

Forfeiture of properties which do not have an ongoing nexus with an active criminal enterprise has no remedial purpose, is purely punitive, and thereby works an impermissible forfeiture of estate. Cf. United States v. Rubin, supra, 559 F.2d, at 991-993.

Accepting the evidence in the light most favorable to the Government, any alleged racketeering enterprise had ceased to function at least a year before the indictment in this case. None of the properties forfeited therefore were presently held interests in any enterprise. Even more dramatically, petitioner's residence in Winter Park, which the record clearly shows was never used as a "stash house" or money-counting house, and was purchased with lawfully acquired funds, never had any ongoing nexus with any criminal enter-

prise.

The forfeitures are further invalidated as there was no competent evidence linking the sites referred to in the testimony with the legal descriptions appearing in the indictment and the judgments of forfeiture. An I.R.S. Agent testified that he merely pulled deeds in the names of defendants without checking legal descriptions. His testimony that he derived the legal descriptions from petitioner's tax returns is refuted by the tax returns themselves, which were in evidence and do not contain this information. This slender evidence would not survive a motion for summary judgment in a state court foreclosure action, and certainly does not satisfy the reasonable doubt standard for criminal forfeiture.

The Eleventh Circuit's unprecedented expansion of criminal forfeiture is in direct conflict with authoritative case law in the Fifth Circuit, decides an important question of law, in that it permits the Government to seize a citizen's home merely because he is alleged to be involved in criminal enterprise, and so far departs from the requirements of law that it cries out for this Court to exercise its supervisory power.

2. THE ADMISSION OF STATMENTS BY ALLEGED COCONSPIRATORS WAS IMPROPER.

After the Government was unable in the first trial to present its case to establish the predicates for admissibility of coconspirator statements under Fed.R.Evid. 801(d)(2)(E) prior to offering those statements as evidence, the trial court ordered a hearing under United States v. James 590 F.2d 575

(5th Cir)(en banc), cert. denied, 442 U.S. 917(1979). Despite defense objections, the James hearing consisted largely of statements by absentee co-conspirators, and of agent testimony from noncontemporaneous notes as to what persons said during interviews about what an alleged coconspirator said.

While this procedure is accepted pursuant to Rule 104(a), Federal Rules of Evidence, in some circuits, e.g., United States v. Vinson, 606 F.2d 149, 153 n.8(6th Cir. 1979); see also United States v. James, supra, at 584 ff. (Tjoflat, J., concurring specially), it directly conflicts with established precedent in the Fifth Circuit. James, supra, at 581. "Evidence at a James hearing for the purposes of proving a conspiracy, must of course, be free from

hearsay objection." United States v. Grassi, 616 F.2d 1295, 1300(5th Cir. 1980). The Eleventh Circuit relies heavily on Fed.R.Evid. 801(d)(2)(A), providing that a defendant's own admissions are not hearsay, to cure this clearly erroneous procedure. (Panel opinion, 4003). However, a close reading of the record shows that out of literally scores of coconspirator statements introduced for James purposes, only a handful were attributed to any of the defendants on trial. The Eleventh Circuit has apparently accepted the Government's novel theory that 801(d)(2)(A) permits the introduction at a James hearing of out-of-court statements by an absent declarant not on trial to show that declarant's membership in the conspiracy. Again, if the panel had adequately reviewed the record, the

error in the Government's argument would have been obvious.

Following the James hearing, the trial court ruled that the predicates for admissibility under 801(d)(2)(E) had been shown, not by substantial, independent evidence, as required by James, but by substantial, "competent" evidence (see Appendix), implicitly accepting the Government's position that it was free to consider coconspirator statements pursuant to Rule 104(a).

The Eleventh Circuit also rejected petitioner GOVERN's argument that the Confrontation Clause was violated by permitting the introduction at trial of out-of-court statements which were mere narratives or gratuitous comments, and therefore manifestly not "in furtherance" of any conspiracy, and unreliable statements vaguely attributed

to "people,""the Colombians,""they," "everybody," or "somebody." The Eleventh Circuit found that admission of these statements was not "clearly erroneous" under 801(d)(2)(E), and therefore did not violate the Confrontation Clause.

Even if the trial court's determinations of admissibility were not clearly erroneous (and they were: e.g., statements to an I.R.S. agent in investigative interview were admitted, in conflict with United States v. Harrell, 436 F.2d 606, 613 (5th Cir. 1970)), statements admissible under a hearsay exception may still violate the Confrontation Clause if they lack indicia of reliability. California v. Green, 399 U.S. 149, 156(1969).

As a result of erroneous procedures and a lack of attention to the values protected by the Confrontation Clause,

defendant GOVERN was buried under an avalanche of hearsay (126 examples cited in petitioner's reply brief below) which cannot be dismissed as harmless beyond a reasonable doubt.

The Eleventh Circuit's decision below presents a direct conflict among the circuits, and presents the important question as to the extent to which the coconspirator exception to the Hearsay Rule may be stretched in farflung conspiracy prosecutions to permit defendants to be convicted by absentee testimony.

3. THE GOVERNMENT'S MANNER OF PROSECUTION VIOLATED DUE PROCESS.

The record in this case reflects that, on or about the date of defendant GOVERN's indictment, the Government seized all of his properties through I.R.S. summary assessment procedures,

a civil forfeiture proceeding, and by a restraining order without notice in this criminal proceeding. Through statements by Government agents at bond hearings, which were later shown to be made with knowledge of their falsity or with reckless disregard for the truth, the Government caused defendant GOVERN's bail to be set at $10,000,000, knowing that it had already deprived him of the means of securing his release. Alone among all of the original 13 defendants charged in this case, he was held continuously in custody from his arrest on April 13, 1982 until the entry of judgment of conviction on November 10, 1982.

Although defendant GOVERN's bond was ultimately reduced to $500,000, the trial court refused to accept a pledge of real properties of that value as

security, contrary to 18 U.S.C. §3146 and established practice in the Middle District of Florida, and contrary to its own order as affirmed by the Eleventh Circuit. Defendant GOVERN also moved for dissolution of the restraining order, and for a prompt hearing. Notwithstanding his entitlement to such a hearing, United States v. Crozier, 674 F.2d 1293, 1297(9th Cir. 1982); United States v. Spilotro, 680 F.2d 612, 617-618 (9th Cir. 1982), the trial court suspended consideration of this motion until trial. The Government admitted that this was error in its brief below, but argued that the issue was moot. Due process, however, requires the opportunity to be heard at a meaningful time in a reasonable manner. Armstrong v. Manzo, 380 U.S. 545,552(1965).

The denial of a timely hearing on the restraining order, and the coordination of criminal, civil and tax proceedings to deny defendant GOVERN's right to pretrial release was a serious deprivation of liberty. It violates the presumption of innocence, and impairs the right to a fair trial and effective assistance of counsel. See Stack v. Boyle, 342 U.S. 1 (1951).

The Fifth Circuit has emphatically denounced the use of summary tax procedures in conjunction with regular criminal procedures, Willits v. Richardson, 497 F.2d 240, 246(5th Cir. 1974), and the unique facts of this case present an issue of exceptional public importance as to how far the Government will be permitted to go in disregarding the presumption of innocence. The gravity

of drug offenses alone does not justify such abuses. Id.

The Eleventh Circuit disregarded this issue with a footnote, saying "it does not warrant discussion." (Panel opinion, 4003 n.7). Due process demands more.

The panel opinion also holds that the prosecutor's plea to the jury to "show sympathy to people who have suffered the effects of millions of pounds of marijuana" was proper. (Id., at 4007). While this statement, standing alone, would probably not constitute reversible error, the panel's holding extends an open invitation to prosecutors to inflammatory rhetoric in all future marijuana prosecutions, degrades the level of practice expected of the Government before this Court, and is in direct conflict with existing circuit

law. See United States v. Newbern, 731 F.2d 744,573(11th Cir. 1984); United States v. Leaman, 546 F.2d 148(5th Cir. 1977).

In both of those cases, closing arguments appealing to the sympathies of jurors for victims of drug conspiracies were held improper, but were cured by timely instructions from the bench. In the instant case, the trial court declined to give any cautionary instruction, finding the remarks to be proper.

4. THE TRIAL COURT ERRED IN DENYING DEFENDANT GOVERN'S MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY WITHOUT A HEARING.

The record reflects that the Government's presentation in the first trial of this case was extremely disorganized, and ended in a mistrial following an improper reference to

a murder by one of the Government witnesses, Diego Morales. The panel's opinion finds that the second trial did not constitute double jeopardy because there was "no evidence" of intentional prosecutorial misconduct, and because the defendants had "immediately" requested a mistrial. (Panel opinion, at 4005-4006).

A review of the trial transcript of August 18, 1982 shows that the defendant did not "retain primary control over the course to be followed" as mandated by United States v. Dinitz, 424 U.S. 600, 609(1976). The Government had previously stipulated in documents filed with the court that any reference to this or other homicides would be irrelevant and highly prejudicial. After the improper statement, the jury was excused, and counsel and the court

conferred at length as to the appropriate course to take. Counsel for the Government at this point stated that curative instruction would be futile, and that "maybe I'll do a better job next time," in effect, requesting a mistrial. At this point, defense counsel requested a recess to confer, after which, and only then, did defendant GOVERN reluctantly agree that the error was incurable and acquiesce to a mistrial.

In denying the defendants' later motions to dismiss the trial court found that the Government had not caused the mistrial (see Appendix), accepting the Government's representation that the witness had been warned not to mention homicides. The evidence suggests that Morales was not warned. The defendant in Oregon v. Kennedy, __U.S.

___, 102 S.Ct. 2083, 2092(1982) was permitted to explore the factual basis of his double jeopardy claim to establish by objective means the intent of the prosecutor. This was not permitted in this case, despite repeated defense requests to examine Morales as to whether he was warned. Without such a hearing, there was no way to determine whether or not the Government had in fact caused the mistrial, and thereby violated the defendant's "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 837(1949). This case should be remanded to the district court for a hearing on this question.

5. THE GOVERNMENT FAILED TO ESTABLISH THE EXISTENCE OF AN "ENTERPRISE" UNDER U.S.C. §1962(d).

The Government failed to show anything more than a loosely knit

conspiracy to distribute marijuana, and therefore the RICO conviction under Counts 1 and 2 are invalid.

It is clear that a RICO enterprise must be something more than a mere conspiracy to commit the predicate acts. The Eighth Circuit requires a showing either of a diverse pattern of crimes or an ascertainable structure beyond that necessary to accomplish the underlying predicate crimes. United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982). See also United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981); United States v. Dickens, 695 F.2d 765 (3d Cir. 1983). Both are absent in this case.

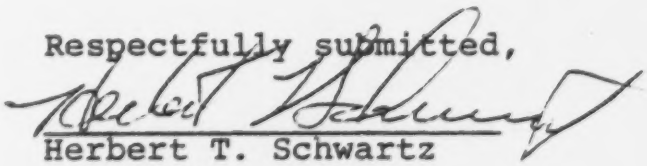
The Government failed to show an enterprise with an ascertainable structure, but an amorphous series of conspiracies involving, in the Government's words, "hundreds of people."

The only evidence of structure, which the panel has accepted uncritically, was testimony by Karen Reynolds about rigid rules, which was completely contradicted by the other Government witnesses, and which is highly suspect because of her testimony that she knew nothing about the alleged organization. The weight ordinarily afforded to jury determinations of fact should be mitigated in this case because the complexity of the RICO concept and the fact that the jury convicted GOVERN on Count 12, an alleged offense for which the Government was obliged to admit that there was absolutely no evidence. It cannot be said with any confidence that the jury believed Karen Reynolds, and if they did not, or should not, the convictions on Counts 1 and 2 cannot stand.

CONCLUSION

The instant petition presents three factors suggesting that this Court should exercise its discretionary jurisdiction to review the judgment below: direct conflict among the circuits, important questions of federal law, and a departure from the accepted requirements of law. Accordingly, the instant petition should be granted.

Respectfully submitted,



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ENTRY OF APPEARANCE
AND
CERTIFICATE OF SERVICE

I hereby enter my appearance herein on behalf of petitioner, ROBERT WALTER GOVERN, and certify that 40 copies of this petition were sent for delivery to the Clerk of this Court by Federal Express, and that a copy was served on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and on John E. Lawlor, III, Esquire, Assistant United States Attorney, Post Office Box 600, Jacksonville, Florida 32201, by United States Mail this 21st day of November, 1984.

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. No. 82-3-Cr-Oc

ROBERT WALTER GOVERN, et al.

ORDER

On August 23 and 24, 1982, this Court held a hearing to determine the admissibility of coconspirator statements at the trial of this cause. At the close of the hearing, in addition to arguing against the admissibility of the statements, several of the defendants made oral motions for severance based upon the common ground that evidence and coconspirator statements admissible solely as to some defendants would have a prejudicial effect on the trial of other defendants.

The Court has considered the evidence presented at the hearing, the

evidence previously presented during the August 16th trial, and the argument of counsel, and finds that the government has demonstrated by substantial competent evidence the existence of the necessary predicates for admission of the coconspirator statements. The Court also finds that a limiting instruction can cure the prejudicial effect expressed by the defendants in their motions for severance.

Accordingly, it is hereby

ORDERED:

1. That the coconspirator statements will be admitted into evidence subject to other appropriate objections, and

2. That the motions for severance are DENIED.

DONE AND ORDERED IN Chambers at Jacksonville, Florida this 14 day of September, 1982.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. No. 82-3-Cr-Oc

ROBERT WALTER GOVERN
KEITH H. GUSTAFSON
THOMAS DAVID WILKERSON
LEON D. MAUSSER
STEVEN T. LIBERATORE
CHAN W. ZIELIE
GABRIEL QUINTERO

ORDER

This cause is before the Court upon each of the defendants' motions for dismissal of the indictment, each motion being based upon a violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The facts giving rise to these motions are that one of the government's principal witnesses testified that "They killed him and he can't testify." This was a gratuitous comment made by the witness after responding to a question as

to who was with him at a certain time. It was not elicited by the government in any manner.

The above testimony must be viewed in the light of the background of this case. There have allegedly been a number of homicides committed by members of an alleged conspiracy. Because none of the indicted alleged conspirators was purportedly involved in any of the homicides, the government, in recognition of the possible harmful effects, filed a motion in limine to prohibit the defense from raising any question regarding homicides. As an officer of the Court, the prosecutor advised the Court that he had cautioned the witness not to make any reference to any homicides. The Court is of the opinion that the witness accidentally and voluntarily testified to the above effect when he was asked a question about a friend of his who had been murdered.

This conduct falls far short of meeting the test that the government must have "intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 102 S.Ct. 2083 (1982).

It is accordingly

ORDERED AND ADJUDGED:

That each of the defendants' motions for dismissal of the indictment on grounds of former jeopardy is DENIED.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 24 day of August, 1982.

_____
UNITED STATES DISTRICT JUDGE

Copies to:

See attached list.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. No. 82-3-Cr-Oc

ROBERT WALTER GOVERN
KEITH H. GUSTAFSON
THOMAS DAVID WILKERSON
LEON D. MAUSSER
STEVEN T. LIBERATORE
CHAN W. ZIELIE
GABRIEL QUINTERO

AMENDED ORDER

This cause is before the Court upon each of the defendants' motions for dismissal of the indictment, each motion being based upon a violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The facts giving rise to these motions are that one of the government's principal witnesses testified that "They killed him and he can't testify." This was a gratuitous comment made by the witness after responding to a question as

to who was with him at a certain time. It was not elicited by the government in any manner.

The above testimony must be viewed in the light of the background of this case. Allegedly, there have been a number of homicides committed by members of an alleged conspiracy. Because none of the indicted alleged conspirators was purportedly involved in any of the homicides, the government, in recognition of the possible harmful effects, filed a motion in limine to prohibit the defense from raising any question regarding homicides. As an officer of the Court, and in response to the Court's inquiry, the prosecutor advised the Court that he had cautioned the witness not to make any reference to any homicides. The Court is of the opinion that the witness accidentally and involuntarily testified to the above

effect when he was asked a question about a friend of his who had been murdered.

This conduct falls far short of meeting the test that the government must have "intended to provoke the defendant into moving for a mistrial." Oregon v. Kennedy, 102 S.C. 2083 (1982). The Court therefore finds the motions to dismiss to be frivolous. United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980).

It is accordingly

ORDERED AND ADJUDGED:

That each of the defendants' motions for dismissal of the indictment on grounds of former jeopardy is DENIED.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 27 day of August, 1982.

UNITED STATES DISTRICT JUDGE

Copies to:

See attached list.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA,

-vs-

CASE NO:
82-c-Cr-Oc

ROBERT WALTER GOVERN,
et al.
_____/

DEFENDANT GOVERN'S POST-TRIAL MOTION FOR JUDGMENTS OF ACQUITTAL

COMES NOW defendant ROBERT WALTER GOVERN, by and through undersigned counsel and pursuant to Rule 29(c) Federal Rules of Criminal Procedure, moves this honorable Court to set aside the verdicts entered against him and to enter Judgments of Acquittal on those counts, and says in support thereof:

1. Jury verdicts of guilty were returned against defendant GOVERN as to counts 1,2,3,5,6,7,8,10,12,13,16,17 and 18 of the Indictment in this cause, and special verdicts of forfeiture were returned under Counts 2 and 17, on

November 10, 1982.

2. The evidence as to each of these counts must give rise to a reasonable doubt, and Judgments of Acquittal should therefore be entered.

3. Defendant GOVERN readopts and incorporates by reference herein the grounds and arguments set forth in his previous motions and memoranda for Judgments of Acquittal, whether or not specifially restated below.

4. The complexity of this case, the length of the trial, the volume of evidence presented, and the entry of guilty verdicts on alleged transactions for which there was absolutely no evidence plainly show that the jury was confused and failed to sift through the evidence and arrive at a fair verdict as to each count.

COUNT 2-FORFEITURE

5. The Indictment alleges that defendant GOVERN'S personal residence at 240 Trismen Terrace, Winter Park, Florida afforded a source of influence over an enterprise and therefore subject to forfeiture under 18 U.S.C. §1963(a) (2).

6. The Court, over defendant GOVERN'S objection, instructed the jury that use of property in furtherance of an enterprise would afford a source of influence over that enterprise.

7. As discussed in the attached memorandum below, that instruction was erroneous.

8. Even assuming the validity of the Government's interpretation of 18 U.S.C. §1963(a)(2), the evidence presented at trial must necessarily give rise to a reasonable doubt as to the propriety of forfeiture.

9. The only testimony as to "use" of the Trismen Terrace residence was that Chris Patterson said he delivered $100,000 there to defendant GOVERN on one occasion.

10. Chris Patterson's testimony is so unreliable that it cannot support a forfeiture verdict without corroboration.

11. There was no evidence whatever that the Trismen Terrace residence was ever used as a "stash farm", a counting house, or was ever used consistently or recognized as a customary location for transacting unlawful business.

12. As to the other properties, the Government failed to present sufficient evidence to establish beyond a reasonable doubt the existence of an interest subject to forfeiture.

COUNT 12

13. Count 12 alleges and the jury found that defendant GOVERN possessed with

intent to distribute a quantity of marijuana near Eustis, Florida in October or November of 1980.

14. There is absolutely no evidence to support this verdict.

15. No Government witness gave any testimony in support of Count 12:

(a) Diego Morales and Ruben Perez said nothing about any load at this time, near Eustis, Florida or elsewhere;

(b) Jesse Jackson mentioned a load in South Florida in later November or early December of 1980, but also testified that GOVERN had been "cut out" at that time, and was not involved with it in any way;

(c) Chris Patterson testified about a load to his farm near Cassia, Florida in October of 1980, but said that he purchased it directly from Tony Fernandez, and that GOVERN was not involved;

(d) Mark Ramsey testified that he picked up marijuana from Chris Patterson's farm in November of 1980, but did not implicate defendant GOVERN, and said only that he saw some "Spanish" persons there;

(e) Karen Reynolds claimed that she and her husband were no longer involved after June of 1980, and so neither said they knew anything about loads in the fall of 1980.

16. This lack of evidence demonstrates to what extent the jury uncritically accepted the Government's allegations rather than base its verdicts on evidence presented at trial.

COUNT 6

17. Count 16 of the Indictment alleges and the jury found that defendant GOVERN possessed with intent to distribute a quantity of marijuana near Eustis, Florida in December of 1978.

18. There is absolutely no evidence to support this verdict.

19. There was no testimony or any other evidence of any kind that any load or other quantity of marijuana near Eustis, Florida in December of 1978, whether possessed by defendant GOVERN or anyone else.

20. Again, the jury apparently made a blanket determination that defendant GOVERN and most of his codefendants had done everything the Government had said, and uncritically accepted the Indictment without regard for the evidence presented.

COUNT 3

21. Count 3 of the Indictment alleges that defendant GOVERN possessed with intent to distribute a quantity of marijuana near Monteverde, Florida on or about April 13, 1978.

22. The only connection between the seizure at Monteverde in April of 1978

and defendant GOVERN was uncorroborated hearsay testimony by Jesse Jackson on what Lee Holcomb is supposed to have said about a "B.B."

23. The supposed tally sheets seized at Monteverde indicate more than one "B.B.", and contrary to the Government's assertion in closing arguments, there were a great many "Bobs" referred to in this case.

24. The unreliability of this scant evidence must give rise to a reasonable doubt as to defendantGOVERN'S guilt of the offense charged in Count 3.

25. In view of the jury's uncritical acceptance of allegations for which there was no evidence, there can be no presumption that this serious factual issue was based on a careful evaluation of the evidence.

COUNT 5

26. Count 5 alleges that defendant GOVERN possessed with intent to distribute

a quantity of marijuana near Eustis, Florida in October of 1978.

27. Both Todd Reynolds and Diego Morales testified that all of the "action" at this time was taking place at the "Loxahatchee house" in West Palm Beach.

28. Jesse Jackson was the only witness who mentioned any load near Eustis, in October of 1978, and his testimony was not that defendant GOVERN constructively possessed the marijuana from afar, but that he was actually present.

29. Defendant GOVERN presented sufficient evidence that he was in Europe throughout the month of October, 1978 that it must raise a reasonable doubt as to his presence at Eustis, Florida at that time.

COUNT 8

30. Count 8 of the Indictment alleges that defendant GOVERN traveled in commerce from Orlando, Florida to Houston, Texas

to promote racketeering on or about February 18, 1980.

31. Chris Patterson testified that defendant GOVERN had been "cut out" at this time, and was not involved in any way.

32. Defendant GOVERN'S business records and the testimony of Joyce Wilhoite established that defendant GOVERN visited her in Houston for three days, that they attended the Houston Rodeo, and that he flew on to Phoenix and Houston on business for G.M. Investments.

COUNTS 1, 2, and 17

34. Counts 1, 2, and 17 of the Indictment allege offenses under the Racketeer Influenced and Corrupt Organizations (RICO) Act.

35. An essential element to be proved beyond a reasonable doubt for any alleged RICO violation is the existence of an "enterprise" separate and apart from

the offenses alleged as a "pattern of racketeering activity."

36. As discussed in the attached memorandum below, the evidence at best shows a simple conspiracy or multiple conspiracies to distribute marijuana, and not the racketeer influenced organization contemplated by the Act.

IN GENERAL

37. The testimony by the substantive Government witnesses was so unreliable that it must give rise to a reasonable doubt.

38. The crucial witnesses in the tax case, Connie Toole, John Gabor, and Ralph Singleton each had compelling motives to distort the truth, particularly Toole and Gabor, who demonstrated that they were not worthy of belief.

39. Much of the evidence in the marijuana case was uncorroborated hearsay, and the credibility of both the

witnesses and the declarants is highly suspect.

40. The critical witnesses in the marijuana case, and in particular Diego Morales, Chris Patterson, and Todd Reynolds, faced lengthy prison terms and received extremely lenient sentences in exchange for their cooperation.

41. Without attributing any bad faith to the Government, it is apparent that these witnesses would volunteer perjured testimony for their own advantage.

WHEREFORE, defendant GOVERN prays that this Court set aside the jury's verdicts against him for the grounds set forth above, and enter Judgments of Acquittal as to the appropriate Counts of the Indictment.

MEMORANDUM OF LAW

A. IN GENERAL.

Defendant GOVERN readopts and

incorporates by reference herein all memoranda previously filed on his behalf pertinent to the matters set out above.

B. FORFEITURE - COUNT 2

The Government has alleged and the jury found that defendant GOVERN'S personal residence at 240 Trismen Terrace, Winter Park, Florida is subject to forfeiture under 18 U.S.C. §1963(a)(2), which provides for forfeiture of:

> any interst in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.[emphasis added]

The Government's interpretation, which prevailed at the charge conference over defendant GOVERN'S objection, is that the underlined language means "used in furtherance of."

The starting point for any statutory interpretation is the language of the

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The starting point for any statutory interpretation is the language of the

statute itself. United States v. Turkette, ___U.S.___, 101 S.Ct. 2524, 2527 (1981). The word "use" does not appear anywhere in §1963(a)(2). By contrast, 21 U.S.C. §881 expressly provides for forfeiture of property used or intended for use in connection with violations of laws pertaining to contolled substances. Had Congress meant "any property used in furtherance", it would have said so. Instead, §1963(a)(2) defines very narrowly the nature of the property subject to forfeiture.

Much has been written on the legislative intent behind RICO forfeiture. In United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980), for example, the Ninth Circuit cited to a letter from the Justice Department to the Senate Subcommittee responsible for the statute, noting that forfeiture is limited to an interest in the enterprise which is the

subject of the offense, and no other property of the defendant. Id., at 768. The Court also cited to the House and Senate Reports on the bill, both interpreting the forfeiture provisions to be limited to interests in the enterprise. Id.

The old Fifth Circuit endorsed this interpretation in United States v. Martino, 681 F2d 952 (5th Cir. Aug. 2, 1982, (en banc). Noting that §1963(a)(1) provided for forfeiture of "any interest" acquired in violation of §1962, the Court sharply contrasted §1963(a)(2), at issue here, which it expressly recognized as being limited to interests in the enterprise, Id., at 954.

This interpretation is consistent with the ejusdem generis principle of construction -- that items listed in a series are meant to be of a like kind. A "contractual or other property interest affording a source of influence" must be

similar to an interest in, security of, or claim against the enterprise. The interest contemplated is "akin to a continuing proprietary right in the nature of a partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment..." United States v. Thevis, 474 F.Supp. 134,142(M.D. Ga. 1979) aff'd., 665, F.2d 616(5th Cir.) cert. den., ___U.S.___, 102 S.Ct. 2300 (1982); United States v. Meyers, 432 F.Supp. 456, 461 (W.D.Pa. 1977).

The statutory purpose of these provisions was not to strip defendants of all property of any kind, but to dismantle criminal enterprise:

> Thus Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would enable a defendant and/or his confederates to maintain control over an organization.

United States v. Rubin, 559 F.2d 975 (5th Cir. 1977) vacated on other grounds, 439 U.S. 810 (1978) (emphasis added). As the statute is directed at the defendant's interest in the enterprise, it really "only operates to the detriment of the enterprise." United States v. Romano, 523 F.Supp. 1209, 1213 (S.D. Fla. 1981).

Another consideration that should guide the Court in its interpretation are the fundamental principles that criminal statutes are to be construed in favor of levity, and that forfeitures are abhorrent to our system and highly disfavored. United States v. Rubin, supra, at 991.

Article III, Section 3, cl.2 of the United States Constitution prohibits forfeiture of estate or corruption of the blood upon conviction for treason. As noted by the Fourth Circuit in United States v. Grande, 620 F.2d 1026, 1037(4th Cir. 1980), it would be irrational to permit

forfeiture of estate for any lesser crime. The Grande court upheld the constitutionality of RICO forfeiture, noting that the statute did not permit forfeiture of all of a defendant's property as practiced by the British in colonial times, but is limited to interests in the enterprise. Id., at 1037-1039. The Court also upheld the statute on Eighth Amendment grounds, holding that forfeiture was not cruel and unusual because it was "directly keyed to the magnitude of the defendant's interest in the enterprise. Id., at 1039. (emphasis added). Any expansion of RICO forfeiture beyond the express statutory limits would violate the Constitution.

The Government relied at the charge conference on United States v. Thevis, supra. While Thevis is perhaps the broadest interpretation to date of the nature of the interest subject to forfeiture under §1963(a)(2), it also refutes

the Government's position. In holding that interests in an informal association were subject to forfeiture under §1963(a)(2), the Court nonetheless endorsed the view that the "interest" must be in the nature of a share of stock or contribution to capital:

> In the case at bar, the enterprise is an association, an organization, absent statutory intervention, incapable of holding property in its own right. Nonetheless, the defendants have allegedly furthered the goal of the enterprise by placing property which they held in their individual or corporate capacities under the control of the association, so that the association could achieve their jointly held goals.
>
> Like an investment in the stock of a corporation or a capital interest in a partnership, a person's informal contribution of property to an association is an interest in that association subject to forfeiture under 18 U.S.C. §1963(a)(2), since the contributed property has been put at the risk of the association's success. It is an investment in the success of the association, just as surely

> as a purchase of stock in a corporation or a contribution of capital to a partnership.

Thevis, supra, at 143. [emphasis added.]

There is absolutely no evidence that defendant GOVERN'S residence was ever contributed to or placed under the control of any enterprise. Accordingly, Judgment of Acquittal should be entered as to the forfeiture verdict on the Trismen Terrace residence.

C. EXISTENCE OF AN ENTERPRISE

A recent Eleventh Circuit RICO decision dramatizes again the nature of the "enterprise" and "pattern of racketeering" contemplated under the statute. In United States v. Kopituk, (11th Cir. slip opinion Nov. 4, 1982), the defendants infiltrated and controlled waterfront unions through extortion, murder, and other unlawful acts distinct from the enterprise. Application of RICO to this case is highly inappropriate, as it

bootstraps simple conspiracies to import and distribute marijuana, a Schedule I controlled substance, punishable by 5 years' imprisonment up to a 20-year felony with forfeiture provisions. For the language of the RICO Act to be more than mere surplusage, it must require predicate acts different in nature from the enterprise. Moreover, there must be a more or less coherent ongoing organization, rather than the disjointed free-for-all of importers, distributors, and buyers described by the Government's witnesses.

D. CONCLUSION.

As set out in the foregoing Motion, the jury returned guilty verdicts on counts for which there was absolutely no evidence. Given the complexity of this case, this was understandable. However, defendant GOVERN is entitled to relief from those matters for which a reasonably minded jury would have had to entertain a

reasonable doubt had each of these serious felonies been tried separately.

Defendant GOVERN respectfully requests that the Government state with particularity, and especially with respect to counts 12, 6, 3 and 5, what evidence was presented to support conviction beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following listed counsel of record by United States Mail this 23rd day of November, 1982.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 82-3-Cr-Oc

ROBERT WALTER GOVERN,
et al.

ORDER

The Court has for consideration various post-trial motions filed by the defendants. Upon review of the motions and memoranda, and being fully advised in the premises, it is hereby

ORDERED:

1. That Thomas David Wilkerson's motion for judgment of acquittal and motion for new trial are DENIED;

2. That Chan W. Zielie's motion for new trial is DENIED:

3. That Leon D. Mausser's motion for judgment of acquittal and motion for

new trial are DENIED;

4. That Keith H. Gustafson's motion for judgment of acquittal or, in the alternative, for a new trial is DENIED;

5. That Robert Walter Govern's motion for new trial and motion for judgments of acquittal are denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 23 day of December, 1982.

_____
UNITED STATES DISTRICT JUDGE

Copies to:

See attached list.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Chan Walker ZIELIE, Keith H. Gustafson, Thomas David Wilkerson, Robert Walker Govern, and Leon D. Mausser,

Defendants-Appellants.

No. 82-3167.

United States Court of Appeals,

Eleventh Circuit.

June 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

Before FAY, VANCE and HATCHETT, Circuit Judges.

FAY, Circuit Judge:

This case involves a group of individuals who associated together to profit from a large marijuana distribution network. Thirteen defendants, including the five appellants, were originally charged

in an eighteen-court indictment.[1] Following a jury trial appellants were convicted of conspiring to violate and violating the racketeering statutes, 18 U.S.C. §§ 1961, 1962(a), (c) and (d), and 1963 (1980); the Travel Act, 18 U.S.C. §§ 1952(a) (3) and 2(1980); the federal drug laws, 21 U.S.C. 841(a) (1) and 846 (1980) and 18 U.S.C. §2 (1980); and the personal income tax laws, 18 U.S.C. §371 (1980). Each appellant challenges his convictions on numerous grounds. After careful examination of each of their arguments, we affirm each appellant's conviction on each count charged in the indictment, with the exception of the conviction of Robert Govern on Count Twelve, which we vacate.

I. THE FACTS

Robert Govern supervised a large network which distributed multi-ton quantities of marijuana from 1977 until 1982.

Tony Fernandez was the head of the importation phase of the operation. Directly under Fernandez was appellant Govern, the head of the American distribution network, who purchased the marijuana from Fernandez and then resold it. Appellant Gustafson and Todd Reynolds worked directly for Govern. Tom Tucker, Steve Liberatore, Emmett Holcomb and appellant Zielie were some of the buyers of Govern's marijuana. These buyers, in turn, had their own employees in the netowrk. Appellant Mausser accepted payments for the marijuana and was part of Govern's money laundering projects.

The evidence showed a highly structured and well-organized distribution network. There were numerous farms used as stash houses in Florida, Georgia and Texas. The money was kept and collected at Govern's Holatee Trail house

in Florida. The marijuana was usually distributed in quantities ranging from 28,000 to 32,000 pounds.[2] There was a whole network of drivers. Deliveries and pick-ups could only be made between 8:00 a.m. and 5:00 p.m., Monday through Friday. Employees in the operation had fixed weekly salaries. By late 1978 the distribution network had expanded outside of Florida.

This successful enterprise generated huge amounts of cash. The evidence showed that Govern had a cache of at least $2.5 million. Govern, through an attorney, set up an off-shore corporation named Mexivest, N.V. It served as the conduit for channeling Govern's drug money into an apartment complex and a lumber business. Money was also laundered by many off-the-books and under-the-table transactions with the

subcontractors involved in the construction of the apartment complex. From the purchase of the marijuana from Fernandez through the process of channeling the money into other investments, the evidence clearly indicated a group of individuals associated in fact for the purpose of making money through a coordinated and connected series of marijuana transactions.

II. CHAN WALKER ZIELIE'S CLAIMS

A. Speedy Trial Act

Chan Walker Zielie appeals the district court's refusal to dismiss his indictment on the ground that he was denied the right to a speedy trial in violation of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976). Zielie was indicted in this case on April 13, 1982. On April 14, he made his first appearance before a judicial officer

in the district where the indictment was returned. The only motions that he filed were a motion for a speedy trial and several motions to be excused from hearings involving his codefendants. The case was set for trial on June 21, 1982.

From April 22, 1982, through June 24, 1982, Zielie's codefendants filed various pretrial motions. On May 28, 1982, the government filed a motion for continuance of the trial date. Zielie objected to the motion and once more demanded a speedy trial. Several of his codefendants also filed motions to continue the trial and the district court granted the motions on June 8 to serve the ends of justice. The trial was reset for August 16, 1982. On August 12, 1982 Zielie filed a motion for discharge based upon a violation

of the Speedy Trial Act and the district judge denied the motion. Zielie's argument that his right to a speedy trial was violated is based on his inclusion in his computation of the time periods during which various pretrial motions of his codefendants were pending. Yet, by doing this he ignores both Congress' statutory intent and the law in this circuit.

Section 3161(c) of the Speedy Trial Act provides essentially a seventy-day period within which a defendant must be tried.

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment or from the date the

> defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs...

18 U.S.C. § 3161(c).

Yet in calculating the seventy day period, Section 3161(h) of the Act excludes time during which certain proceedings involving the defendant or a codefendant are pending. Among these exclusions are three periods of time relevant to this appeal:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to--

(F) delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

. . . . . .

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

. . . . .

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

The primary purpose of the Speedy Trial Act is to accelerate criminal trials. Congress enacted Section 3161(h)(7) because

it recognized that multidefendant trials are desirable for prompt efficient disposition of criminal cases. It stressed that "the purpose of the provision is to make sure that [the Speedy Trial Act] does not alter the present rules on severance of codefendants by forcing the government to prosecute the first defendant separately or to be subject to a speedy trial dismissal motion under Section 3161." S.Rep.No. 93-1021, 93rd Cong., 2d Session (1974). For this reason the rule in this circuit is clear that a time exclusion that applies to one defendant is applicable to all codefendants. United States v. Campbell, 706 F.2d 1138 (11th Cir. 1983); United States v. Stafford, 697 F.2d 1368 (11th Cir. 1982); United States v. Varella, 692 F.2d 1352 (11th Cir. 1982); United States v. Davis, 679 F.2d 845 (11th Cir. 1982). Even though Zielie may not have

triggered any excludable periods of delay by the filing of his own motions, the periods of excludable delay generated by the motions of his codefendants are attributable to him under Section 3161(h)(7). There was no violation of Zielie's speedy trial rights in this case.

B. Right to be Appointed as Co-Counsel.

Zielie was represented by counsel in this case from the time of his first appearance. On August 12, 1982, four days prior to the beginning of the first trial, Zielie moved to have himself admitted as co-counsel in the case. He believed that most of the trial would relate only to his codefendant Govern, and he could, therefore, have his counsel attend the trial only on the days that directly involved his case. He would act as his own counsel during the rest of the trial.

The trial court denied his motion. He now asserts on appeal that he was denied his sixth amendment right to self-representation by the court's order.

It is settled law that a defendant has the right to represent himself in a criminal trial, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); 28 U.S.C. § 1654. He also has the right to the assistance of counsel. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The concept of self-representation has been codified in 28 U.S.C. § 1654 (1980) which states that "[i]n all courts of the United States .... parties may plead and conduct their own case personally or by counsel...." However, this provision does not give the criminal defendant the right to a hybrid representation, i.e., partly by counsel and partly by himself. Courts

have consistently interpreted the statute as stating a defendant's rights in the disjunctive. United States v. Shea, 508 F.2d 82, 86 (5th Cir.), cert. denied, 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975); United States v. Lang, 527 F.2d 1264 (4th Cir. 1975); Duke v. United States, 255 F.2d 721 (9th Cir. 1958). The district court did not err in refusing to let Zielie appear as co-counsel.

C. Opening Statement

The second trial[3] in this case commenced on September 20, 1982. The district judge afforded counsel for all parties the opportunity to make an opening statement. Some of the parties chose to make their opening statements at that time. Zielie's counsel did not make his statement then but reserved the right to do so when he presented his case-in-chief. When it was time to present Zielie's case-

in-chief his counsel advised the district judge that the only evidence that he would be presenting would be the testimony of co-defendant Govern. Since it quickly became apparent that Govern would invoke his fifth amendment right against self-incrimination, and thus realistically Zielie would not be presenting any evidence, the district judge asked Zielie's counsel if he still wanted to make an opening statement. Zielie's counsel advised the court that he needed an opening statement to explain to the jury general points of law. The district judge then denied his request. Zielie asserts on appeal that the district court's ruling was erroneous and he should be granted a new trial. We disagree.

The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testi-

mony to the whole." United States v. Dinitz, 424 U.S. 600, 612, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976). The timing and making of opening statements is within the discretion of the trial judge. See United States v. Salovitz, 701 F.2d 17, 21 (2nd Cir. 1983); United States v. Hershenow, 680 F.2d 847, 858 (1st Cir. 1982). He can exclude irrelevant facts and stop argument if it occurs. See United States v. Hershenow, 680 F.2d at 858; United States v. Freeman, 514 F.2d 1184, 1192 (10th Cir. 1975). The Constitution requires that trials be fairly conducted and that "guaranteed rights of defendants be scrupulously respected." McGautha v. California, 402 U.S. 183, 221, 91 S.Ct. 1454, 1474, 28 L.Ed.2d 711 (1971). However, an opening statement by the defendant is not such a guaranteed right.[4] The making and timing of opening state-

ments can be left constitutionally to the informed discretion of the trial judge. Although failure to afford a defendant the opportunity to make an opening statement can constitute error, United States v. Breedlove, 576 F.2d 57, 60 (5th Cir. 1978),[5] this is not such a case.

The facts indicate that the government had already rested its case. Defense counsel advised the court that he would call no witnesses and introduce no evidence. Instead, he explained to the court that he needed an opening statement to explain to the jury the presumption of innocence and other basic points of law. Clearly, this is not the purpose of an opening statement. An opening statement gives counsel the opportunity to explain the case to the jury and to outline the proof. "[I]t is not an occasion for argument." United States v. Dinitz, 424 U.S. at 612, 96 S.Ct. at 1082. The

district judge did not err in denying Zielie's counsel the opportunity of making an opening statement.

D. Zielie's Other Motions

Zielie was charged in two counts of the indictment. Count Seven charged that on or about January 13th and 14th, 1979, near Eustis, Florida, Zielie possessed marijuana with intent to distribute. Count Sixteen charged Zielie with conspiracy to possess and distribute marijuana.[6] Zielie filed two separate motions in limine and a motion for judgment of acquittal as to both counts. The district judge denied both motions in limine and granted the motion for acquittal as to Count Sixteen, the conspiracy count, but denied it as to Count Seven for possession with intent to distribute. Zielie challenges the district court's rulings. Finding no error in these rulings, we affirm Zielie's conviction.

On August 25, 1982, Zielie filed a motion in limine seeking to preclude all non-expert witnesses from identifying as marijuana the brown-green, leafy material that he was charged with possessing and distributing. He asserted that none of the marijuana that he allegedly received and distributed had ever been seen, seized or tested by qualified law enforcement personnel or a qualified expert in the field of botany or forensic chemistry; therefore, no testimony identifying it as marijuana should be permitted. We find the court properly allowed Diego Morales and Todd Reynolds, two experienced marijuana dealers, to testify that the substance given to Zielie on or about January 13-14, 1979, was marijuana.

The law is quite clear that the introduction of a chemical analysis of the substance is not essential to conviction.

United States v. Graham, 464 F.2d 1073 (5th Cir. 1972). The uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue. See, e.g. United States v. Crisp, 563 F.2d 1242, 1244 (5th Cir. 1977); United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir.), cert. denied, 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975). The narcotic nature of the substance need not be proved by direct evidence if the circumstantial evidence presented established, as it did here, that beyond a reasonable doubt the substance was marijuana. See e.g., United States v. Gregorio, 497 F.2d 1253, 1263 (4th Cir. 1974); United States v. Jones, 480 F.2d 954, 960 n. 4 (5th Cir.1973), cert. denied sub nom., Stockmar v. United

States, 414 U.S. 1071, 94 S.Ct. 582, 38 L.Ed.2d 476 (1974). The district judge properly denied this motion in limine.

Zielie also filed another motion in limine to exclude all evidence which related to drug transactions between him and government witness Morales that were distinct and separate from the transaction involved in Count Seven. The district judge properly denied the motion and admitted the evidence of the uncharged transactions. It does not matter that these other transactions were not alleged as overt acts in the indictment. Courts have consistently held that "the government is not limited to overt acts pleaded in proving a conspiracy." United States v. Perez, 489 F.2d 51, 70 (5th Cir.), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1973). Accord, United States v.

Ayres, 434 F.2d 60 (5th Cir. 1970), cert. denied sub nom., Sidney v. United States, 401 U.S. 938, 91 S.Ct. 930, 28 L.Ed.2d 217 (1971). In this case, because the evidence of the other transactions was offered to prove the conspiracy charged in Count Sixteen, its admission was proper.

At the close of the government's case-in-chief Zielie moved for acquittal on Counts Seven and Sixteen. The motion was granted for Count Sixteen, the conspiracy charge, but denied for Count Seven, the substantive charge of possession of marijuana with intent to distribute. Zielie argues that his acquittal on the conspiracy count necessarily must result in his acquittal on the substantive count. This argument is clearly wrong since it is not inconsistent for a court to acquit a defendant on a conspiracy count while convicting him on

a substantive count. See, e.g., United States v. Palmiotto, 347 F.2d 223 (2d Cir. 1965); United States v. Wilson, 342 F.2d 43 (2d Cir. 1965). The jury's verdict on Count Seven was supported by substantial evidence. United States v. Malatesta, 590 F.2d 1379 (5th Cir.) (en banc), cert. denied, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). The district judge properly ruled on these three motions.

III. ROBERT WALTER GOVERN'S CLAIMS[7]

A. Statements of Co-Conspirators

Govern challenges the admissibility at trial of out of court statements made by co-conspirators. In advancing this claim Govern argues that the district court erred in both the conduct of the James hearing and in the application of the "in furtherance of the conspiracy" requirement of Federal Rule of Evidence 801(d)(2)(E). We disagree.

Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is made "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Such statements are admissible, however, only if the government presents substantial, independent evidence showing: (1) that a conspiracy existed, (2) that the defendant and declarant were both members of the conspiracy, and (3) that the statement was made during the course of and in furtherance of the conspiracy. United States v. James, 590 F.2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Accord, United States v. Yonn, 702 F.2d 1341 (11th Cir.1983). The trial court's finding is a factual determination, United States v. Perry, 624 F.2d 29, 30 (5th Cir.1980), subject to review under the clearly erroneous

standard. United States v. Bulman, 667 F.2d 1374, 1379 (11th Cir.), cert. denied, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982).

The court in this case held a James hearing. The judge allowed the prosecution to present hearsay testimony. Govern asserts that the government cannot prove the conspiracy at a James hearing through any kind of hearsay. A reading of James clearly discloses the error in appellant's argument. The threshold determination concerning the admissibility of co-conspirator statements is made pursuant to Fed.R. Evid. 104(a). This rule provides that the court "is not bound by the Rules of Evidence except those with respect to privileges." Fed.R.Evid. 104(a). Thus hearsay statements are admissible at the James hearing with one caveat-

the court may not "rely upon the content of the very statement whose admissibility is at issue." United States v. James, 590 F.2d at 581. Thus, independent evidence, separate from the hearsay statements, must demonstrate the existence of a conspiracy.

There is extensive independent evidence in this record which sustains the district court's finding of a conspiracy. In reviewing a James hearing we may also consider, only against the particular defendant-declarant, the statements that he himself made to others. A defendant's own statements are admissible against him as party admissions under Fed.R.Evid. 801(d)(2)(A). United States v. Hewitt, 663 F.2d 1381, 1388 (11th Cir. 1981). Thus, a defendant's own statements constitute independent evidence for the purpose of applying the James standards as to that particular

defendant. Most of the evidence at the James hearing in this case was testimony by Diego Morales and John Patterson as to conversations with numerous people, including appellant Govern. The statements made by Govern in furtherance of the conspiracy were properly admissible against him.

B. Sufficiency of the Evidence

Govern argues that the evidence adduced at trial was insufficient to support his convictions on Counts One through Six, Eight, Twelve, Seventeen and Eighteen and the district court erred in denying his motion for judgment of acquittal. After a careful review of the record we affirm the convictions of appellant Govern except for Count Twelve.

Challenges to the sufficiency of the evidence are measured by the standard set out in United States v. Bell, 678

F.2d 547 (5th Cir. Unit B) (en banc), aff'd on other grounds, __ U.S. __, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).[8]

The court in Bell stated that:

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

Id. at 549.

We must view the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and accept all reasonable inferences and credibility choices by the fact-finder, United States

v. Gonzalez, 719 F.2d 1516, 1521-22 (11th Cir. 1983).

After a careful review of the record we find the evidence presented was clearly sufficient to meet the government's burden and we affirm Govern's convictions on all Counts, except Count Twelve.[9] Count Twelve charged defendant Govern with possession of marijuana with intent to distribute near Eustis, Florida, during November, 1980. The evidence introduced at trial showed that Govern was involved with distribution of marijuana in South Florida but not near Eustis. R.Vol.XXIV at 1695-96. Govern's conviction as to Count Twelve is reversed and his sentence as to this count is vacated.

C. Criminal Forfeiture

Count Two of the Indictment alleged that several parcels of real property, owned in whole or in part by Govern,

afforded him a source of influence over the racketeering enterprise described in Count Two. These parcels were, therefore, subject to forfeiture pursuant to 18 U.S.C. § 1963(a)(2) (1980). Govern's mansion, the Loxahatchee house and the Holatee Trail house were forfeited to the United States pursuant to the jury's verdict. Govern now challenges these forfeitures.

Under 18 U.S.C. § 1963(a) (1976), a defendant who

> violates any provision of Section 1962...shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interests in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated,

controlled, conducted, or participated in the conduct of, in violation of Section 1962.

In order to have a violation of Section 1962 there must be (1) an enterprise which affects interstate or foreign commerce, (2) a defendant associated with the enterprise, (3) who participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity. United States v. Bright, 630 F.2d 804, 829 (5th Cir. 1980). Appellant asserts that there was no "legal entity" that constituted an enterprise and therefore the property should not have been forfeited to the government. We disagree.

In United States v. Martino, 681 F.2d 952 (5th Cir.1982) (en banc), the court carefully set forth the legislative history of the Organized Crime Control Act of 1970 and concluded that "Congress'

express objective in RICO i to take the profit out of organized crime." Id. at 957 (footnote omitted). Congress mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Based on its careful analysis of the legislative history and faced with a RICO enterprise that was "an association in fact rather than a legal entity," id. at 958, the court concluded that "reading an enterprise limitation into § 1963(a)(1) renders that section surplusage." Id. at 955; Cf. United States v. Cagnina, 697 F.2d 915 (11th Cir. 1983), cert. denied, ___U.S.___, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983) (enterprise can include informal criminal network engaged in racketeering activity.)

Properties that are owned by a RICO participant and used by him to further the affairs of a RICO enterprise afford the owner/participant a source of influence over the enterprise and are thus subject to forfeiture under 18 U.S.C. § 1963(a)(2). The evidence in this case showed that Govern bought these properties during years when he had little reported income. These parcels were used almost exclusively as stash or money-counting houses. They clearly were Govern's contribution to the enterprise described in Count Two and properly forfeited to the United States.

IV. DOUBLE JEOPARDY CLAIM

The original trial in this case began on August 16, 1982, in Ocala, Florida. The government started its case by calling various persons who testified as custodian of record or chain of custody witnesses. Several

witnesses identified documentary evidence. The government's first fact witness was Diego Morales, a marijuana dealer. After many hours on the stand the prosecutor asked him on redirect who had accompanied him on a particular trip to one of the marijuana farms. He answered, "Leonel Fernandez. They killed him; can't testify." R.Vol. LII at 208. Immediately, all of the defendants moved for a mistrial which was granted by the district judge. Prior to the second trial all of the defendants moved for dismissal of the indictment on double jeopardy grounds. The district judge denied the motions which he characterized as "frivolous." R.Vol. X at 507-508. All of the appellants once more assert that the indictments against them should be dismissed on double jeopardy grounds. We affirm the district court's ruling.

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976). Where the trial is terminated over the objection of the defendant the test for lifting the double jeopardy bar to a second trial is the "manifest necessity" test first set out by the Supreme Court in United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824). The usual situation meeting this standard is the hung jury. But in the case of mistrial declared at the request of a defendant, "there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial." Oregon v. Kennedy, 456 U.S. 667, 673, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982) (citations omitted).

A defendant's motion for a mistrial constitutes "a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact." United States v. Scott, 437 U.S. 82, 93, 98 S.Ct. 2187, 2195, 57 L.Ed.2d 65 (1978). If prosecutorial error has occurred which warrants a mistrial, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." United States v. Dinitz, 424 U.S. at 609, 96 S.Ct. at 1080. Thus, only in "those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial," Oregon v. Kennedy, 456 U.S. at 679, 102 S.Ct.

at 2091, can the Double Jeopardy Clause bar the second trial.

Nowhere in this record can we find that the prosecutor intended to cause a mistrial and subvert the protection afforded to these defendants by the Double Jeopardy Clause. The government gained no advantage by the mistrial since the evidence adduced at the second trial was the same as that used in the first trial. See Arizona v. Washington, 434 U.S. 497, 508, 98 S.Ct. 824, 831, 54 L.Ed.2d 717 (1978); United States v. Opager, 616 F.2d 231, 234 (5th Cir.1980). Nothing in this case indicates the level of conduct necessary for a finding of prosecutorial overreaching. Compare United States v. Kessler, 530 F.2d 1246 (5th Cir.1976) with United States v. Broderick, 425 F.Supp. 93 (S.D. Fla.1977). But cf. United States v. Garza, 603 F.2d 578 (5th Cir.1979). We find

appellants' double jeopardy argument to be without merit.

V. COMMUNICATION WITH JURY

On November 8, 1982, after receiving its instructions, the jury retired to deliberate. Shortly thereafter, the jury sent a note to the court which stated: "May we please have a copy of the transcript?" Vol. XXXVIII at 4774. The court, without discussing it with any counsel, sent a note back which read: "Transcripts are not normally prepared during a trial, have not been prepared in this case; you must follow your collective recollection of the evidence." Id. Appellant Gustafson now alleges that this communication with the jury, without prior consultation with the defendant and his attorney denied Gustafson his right to be present at every stage of his trial. We disagree.

In Rogers v. United States, 422 U.S. 35, 38, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975), the Supreme Court stated the rule which governs this incident:

> In Fillippon v. Albion Vein Slate Co., 250 U.S. 76 [39 S.Ct. 435, 63 L.Ed.853] (1919), the Court observed 'that the orderly conduct of a trial by jury essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.'[10]

However, the Rogers opinion clearly indicated that in some circumstances the error can be harmless. Rogers v. United States, 422 U.S. at 40, 95 S.Ct. at 2095. This is such a case.

Gustafson has not shown in what manner he was prejudiced. The district court's action was purely ministerial, advising the jury that no transcript was available. He has not challenged the accuracy of the district court's answer, nor could he. We by no means approve of any unjustified jury-court communication without notifying all counsel. But when the judge's answer to the jury's inquiry is distinctly responsive to the question; clearly states the law; and no prejudice is shown, the error is harmless. United States v. McDuffie, 542 F.2d 236, 241 (5th Cir.1976).

VI. PROSECUTION'S CLOSING ARGUMENT

Appellants Govern and Gustafson assert that the prosecutor, during rebuttal, made two separate comments which denied them a fair trial. These comments were:

And if you want to show sympathy

don't show it to Mr. Govern because we're picking on him. Show it to people who have suffered the effects of millions of pounds of marijuana. These are the people that need your sympathy.

R.Vol. XXXVII at 4713.

These people are on trial, and Mr. Govern deserves to be found guilty for everything he did and I'm here to do justice, yes, sir, I am, and I'm also here, contrary to what Mr. Wilson said, to win. And the reason I want to win with respect to Mr. Govern, because if I win that's justice.

R.Vol. XXXVII at 4714.

The test for determining the existence of prosecutorial misconduct is whether the remarks were improper and prejudicially affected substantial rights of

the defendants. United States v. Phillips, 664 F.2d 971, 1030 (5th Cir. 1981)(Unit B), cert. denied, sub nom. Meinster v. United States, 457 U.S. 1136. 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981).

In this case, the two remarks were neither improper nor of such a nature that they affected substantial rights of the defendants. Reference during closing argument to the drug problems of society and defendants' roles in such problems are not unduly prejudicial or excessively inflammatory. See, e.g., United States v. Metz, 608 F.2d 147, 158 (5th Cir. 1979). The second comment falls safely on the legal side of the line between improper expression of the prosecutor's opinion and appropriate conclusions to be drawn from the evidence. See United States v. Siegel, 587 F.2d 721, 727 (5th Cir. 1979).

These remarks did not prejudicially affect substantial rights of the appellants and thus do not constitute reversible error.

VII. REMARKS MADE BY MAUSSER'S COUNSEL

During closing argument counsel for defendant Mausser made the following comment to the jury:

> And he, the evidence we've proven, he's an honest and trustworthy man. He's one of the few who's testified. He stood up there and the prosecution worked him over. He was on that stand for a whole afternoon to defend his name.

R. Vol. XXXVII at 4639.

Counsel for codefendant Gustafson, joined by counsel for codefendant Wilkerson, made a motion for mistrial, asserting that it was an impermissible comment upon their client's failure to testify. Counsel for Mausser apologized for his

remark by stating:

> Your honor, I was trying to bring out a point there and I guess-- it was about the quantity of witnesses over quality, and I didn't even realize what I said and I didn't even know about it till afterwards, and I certainly respectfully say to the Court and to all the other defendants and lawyers and the prosecutor, that i did not mean it that way and I had no intention ever to go in that area.

R. Vol. XXXVII at 4642.

The court, thereafter, denied the motion because it concluded that any reference to the codefendants' failure to testify was unintentional and of such a character that the jury would not necessarily take it to be a comment on the codefendants' failure to testify. R.Vol. XXXVII at 4646-4647. The district judge applied the proper

standard and we affirm his denial of the motion for a mistrial.

There is no doubt that this circuit has a clearly established rule that convictions can be overturned where a comment on a defendant's exercise of his right to remain silent impairs the integrity of that right. This is true whether the comment is made by the prosecutor or by counsel for a codefendant. See, United States v. Aguiar, 610 F.2d 1296, 1302 (5th Cir.1980), cert. denied, 449 U.S. 827, 101 S.Ct. 91, 66 L.Ed.2d 31 (1981); United States v. Kaplan, 576 F.2d 598, 600 (5th Cir.1978), cert. denied, 439 U.S. 1078, 99 S.Ct.858, 59 L.Ed.2d 47 (1979). However, not every statement is a comment on silence.

The standard for determining if there has been an impermissible comment upon a defendant's right not to testify at trial is "whether the statement was

manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify." United States v. Dearden, 546 F.2d 622, 625 (5th Cir.), cert. denied, 434 U.S. 902, 98 S.Ct. 295, 54 L.Ed.2d 188 (1977); United States v. Vera, 701 F.2d 1349, 1362 (11th Cir.1983). In applying this test, the court must "look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact upon the jury." United States v. Forrest, 620 F.2d 446, 455 (5th Cir.1980), quoting Samuels v. United States, 398 F.2d 964, 967 (5th Cir.), cert. denied, 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969).

Applying the appropriate standards to the statement in this case it is clear that it was not manifestly intended, nor would a jury rationally and neces-

sarily construe it to be, a comment on silence. The statement was an attempt to bolster Mausser's testimony and to enhance his credibility. See United States v. Macker, 608 F.2d 223, 226-27 (5th Cir. 1979). The Fifth Circuit has stated that:

> A mere favorable comment upon the fact that one of several co-defendants testified does not involve the same potential for prejudice as an adverse comment by counsel upon the failure to testify of the other co-defendant.

United States v. Hodges, 502 F.2d 586, 587 (5th Cir.1974). The statement at issue here is a favorable comment on the fact that Mausser testified and not an adverse comment on Gustafson's or Wilkerson's failure to testify.

VIII. RICO CONVICTIONS

Appellants Govern, Gustafson and

Wilkerson challenge the district court's denial of their motions for judgment of acquittal.[11] They claim that there was insufficient evidence at trial to support convictions under 18 U.S.C. §§ 1962(c) and (d) (1976) ("RICO").[12] Specifically they argue that the government failed to establish the existence of an "enterprise," within the meaning of the RICO statute, separate and apart from the underlying pattern of racketeering activity. Both the law and the facts of this case defeat their argument.

In United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the Supreme Court held that a RICO enterprise could be engaged solely in illegitimate activity without fusing the enterprise with the pattern of racketeering activity. In reaching its decision the Court discussed the elements of RICO and the meaning of the word

"enterprise" under the statute. It stated:

> That a wholly criminal enterprise comes within the ambit of the statute does not mean that a 'pattern of racketeering activity' is an 'enterprise.' In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute [citation omitted]. The former is proved by evidence of an ongoing organization, formal or informal, and by

> evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.

452 U.S. at 583, 101 S.Ct. at 2528.

Thus, in order to prove a substantive RICO violation the government must prove both an enterprise and a pattern of racketeering activity. United States v. Cagnina, 697 F.2d 915 (11th Cir. 1983), cert. denied, ___U.S.___, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983). A pattern of racketeering activity alone is not a crime under RICO. The gravamen of a RICO offense is conducting an enter-

prise through a pattern of racketeering activity. United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). This circuit has interpreted "enterprise" to mean "an informal criminal network engaged in racketeering activity.. .." United States v. Cagnina, 697 F.2d at 920. An enterprise need not be a "duly formed corporation that elects officers and hold annual meetings...." United States v. Elliott, 571 F.2d at 898. It can be a loose and informal "amoeba-like infra-structure that controls a secret criminal network...." Id. The precedent in this circuit clearly indicates that "a RICO enterprise exists where a group of persons associate, formally or informally, with the purpose of conducting illegal activity." United States v. Hewes, 729 F.2d 1302 at 1311 (11th Cir. 1984).

There was sufficient evidence in this case for the jury to find a RICO "enterprise" as that term has been interpreted by the Supreme Court and this circuit. The indictment in this case alleged that there was an enterprise consisting of a group of individuals associated in fact for the purpose of distributing marijuana. The evidence clearly showed that Govern would buy marijuana and redistribute it through the organization that he headed. This distribution group was an ongoing organization, possessing a well-defined structure, with continuity of membership and purpose. R.Vol. XXV at 1936. Testimony at trial showed a structure with extensive records. R.Vol. XXVII at 2567-68. There were fixed salaries, R.Vol. XXVII at 2563, and fixed hours of operation. R.Vol. XXVII at 2453. The evidence

clearly indicated that appellants were members of a group of individuals associated in fact for the purpose of making money through a coordinated and connected series of marijuana transactions. Such evidence was sufficient to establish an enterprise under 18 U.S.C. § 1962(c) and (d).

IX. MOTIONS TO SEVER

Appellants Gustafson, Mausser and Wilkerson assert that the trial court erred in denying their respective motions to sever. All three claim error on the part of the trial court for its failure to sever Counts Seventeen and Eighteen, the money laundering counts, from the rest of the Indictment. Appellants Mausser and Wilkerson also claim that they should have been tried separately from all other codefendants in light of the small amount of evidence introduced against them versus the vast

amounts introduced against all other codefendants. Since the appellants have not shown that they suffered any compelling prejudice as a result of the joint trial we affirm the district court's denial of the motions to sever.

It is well settled that joinder under Rule 8(b)[13] is proper where an indictment charges multiple defendants with participation in a single conspiracy and also charges some but not all of the defendants with substantive counts arising out of the conspiracy. United States v. Weinrich, 586 F.2d 481, 495 (5th Cir.1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). The Fifth Circuit has stated as policy that "Rule 8 is to be broadly construed in favor of initial joinder." United States v. Park, 531 F.2d 754, 761 (5th Cir. 1976).

Yet, even if initial joinder is proper, severance may be granted in the discretion of the trial court under Rule 14[14] if the district court determines prejudice will result from the joinder. United States v. Walker, 720 F.2d at 1533; United States v. Berkowitz, 662 F.2d 1127 (5th Cir.1981)(Unit B). In deciding a Rule 14 motion for severance the trial court must balance the right of a defendant to a fair trial against the public's interest in efficient and economic administration of justice. United States v. Walker, 720 F.2d 1527 (11th Cir. 1983); United States v. Morrow, 537 F.2d 120, 136 (5th Cir. 1976), cert. denied, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). Severance will be granted only if a defendant can demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of

his defense. United States v. Marszalkowski, 669 F.2d 655, 660 (11th Cir.), cert. denied sub nom, Brock v. United States, 459 U.S. 906, 103 S.Ct. 208-09, 74 L.Ed.2d 167 (1982). Appellate courts refusal to grant a severance. United States v. Horton, 646 F.2d 181, 186 (5th Cir.1981). Therefore, our review is limited to determining if there was an abuse of discretion. United States v. Plotke, 725 F.2d 1303, 1309 (11th Cir. 1984).

In order to demonstrate an abuse of discretion. "the defendant must establish that the joint trial subjected him not just to some prejudice, but to compelling prejudice against which the district court could not afford protection." United States v. Harper, 680 F.2d 731, 733 (11th Cir.), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). In determining

prejudice we must consider whether the jury could "individualize each defendant in his relation to the mass," Kotteakos v. United States, 328 U.S. 750, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946), i.e. whether the jury could "keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task is difficult, severance should not be granted." United States v. Lane, 584 F.2d 60, 64 (5th Cir. 1978), quoting Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), vacated in part, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). A defendant does not suffer compelling prejudice simply because much of the evidence at trial is applicable only to his codefendants. United States v. Berkowitz, 662 F.2d at 1135 n. 8. Nothing in this record demonstrates compelling prejudice and the denials

of the motions for severance were not an abuse of discretion.

The convictions and sentences imposed on appellants Zielie, Gustafson, Wilkerson and Mausser are AFFIRMED. The convictions of appellant Govern are AFFIRMED except for Count Twelve which is dismissed and the sentence on this Count is VACATED.

FOOTNOTES

1. Thirteen people were charged on some or all of the counts in the original indictment. Appellants Govern, Gustafson, Mausser, Wilkerson and Zielie were found guilty by the jury on November 10, 1982. Codefendant Liberatore entered a plea of guilty during the first week of trial. The other defendants in the case either pled guilty prior to trial or remained fugitives.

2. The enterprise distributed vast amounts of marijuana. For example, in a five month period in 1978 approximately 150,000 pounds of marijuana passed through Govern's Loxahatchee house.

3. The first trial in this case began on August 16, 1982. It ended in a mistrial. See Section IV.

4. The Supreme Court has limited the

constitutional right to oral argument to final argument or summation. They have stated that "[t]here is no constitutional right to oral argument at any state of the trial or appellate process." Herring v. New York, 422 U.S. 853, 863 n. 13, 95 S.Ct. 2550, 2555 n. 13, 45 L.Ed.2d 593 (1974).

5. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

6. Appellants Govern and Wilkerson also challenge their convictions on Count Sixteen arguing that the evidence introduced at trial established a number of separate conspiracies but not the single conspiracy charged in Count Sixteen. There is no merit to this argument. The trial judge properly found

that the multiple conspiracy issue was an issue of fact to be resolved by the jury. United States v. Lee, 695 F.2d 515 (11th Cir.1983). It submitted it to the jury with an appropriate instruction. R. Vol. XXXVIII at 4745-46.

7. Govern also challenged several evidentiary rulings of the trial court and asserted that the government's prosecution of this case violated his due process rights. We find these issues do not warrant discussion.

8. The Eleventh Circuit has adopted as binding precedent decisions of Unit B of the former Fifth Circuit. Stein v. Reynolds Securities, Inc., 667 F.2d 33,34 (11th Cir. 1982).

9. Government's counsel conceded this point to the court at oral argument.

10. This principle is also embodied in F.R. Crim.P. 43 which affords the defendant the right to be present at

all stages of the trial, from arraignment to the return of the verdict.

11. Gustafson and Govern also challenged the denial of the motions for judgment of acquittal on the RICO charges on two other grounds. First, they argue that marijuana is not a dangerous drug as that term is used in 18 U.S.C. § 1961(1) (1976). This argument has been made to this court before and rejected. See, e.g., United States v. Phillips, 664 F.2d 971, 1040 (5th Cir.1981) (Unit B), cert. denied sub nom, Meinster v. United States, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Secondly, appellant Govern asserts that the application of the RICO statute to this case is improper because the only acts of racketeering alleged in the indictment were possession and distribution of marijuana and interstate travel to promote

the same. Again, the argument is without merit since 18 U.S.C. § 1961(1) states that trafficking in dangerous drugs is a racketeering activity. 18 U.S.C. § 1962(c) states that a RICO violation will lie when a person participates in or conducts a RICO enterprise's affairs through a pattern of racketeering. Therefore, once an enterprise has been established two Title 21 drug offenses would be sufficient to sustain a conviction under RICO.

12. 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection

of unlawful debt.

18 U.S.C. § 1962(d) makes it unlawful for any person to conspire to violate § 1962(c). The statute provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A "pattern of racketeering activity" requires at least two acts of "racketeering activity" committed within ten years of each other. 18 U.S.C. § 1961(5). "Racketeering activity" includes three broad categories of crimes: (a) any of several specified "act[s] or threat[s] ... chargeable under State law and punishable by imprisonment for more than one year", including, as relevant here, murder, attempted murder, arson, extortion, and dealing in narcotics, (b) any act which is indict-

able under any of several specified sections of 18 U.S.C., including § 472 (issuing conterfeit securities) and § 659 (felonious theft from interstate shipment), and (c) federal offenses involving narcotics or other dangerous drugs.

13. Fed.R.Crim.P. 8(b) provides in pertinent part:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

14. Fed.R.Crim.P. 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by

such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires.

FOR THE ELEVENTH CIRCUIT

No. 82-3167

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHAN WALKER ZIELIE,
KEITH H. GUSTAFSON,
THOMAS DAVID WILKERSON,
ROBERT WALTER GOVERN,
and LEON D. MAUSSER,

Defendants-Appellants.

- - - - - - - - - -

Appeal from the United States
District Court for the
Middle District of Florida

- - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 25, 1984, 11 Cir., 198__,

F.2d _____).

(AUG 6, 1984)

Before FAY, VANCE and HATCHETT, Circuit Judges.

PER CURIAM:

(X) The Petition of Robert Walter Govern for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Ruile 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service

not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-6
(Rev. 6/82)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-3167

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHAN WALKER ZIELIE,
KEITH H. GUSTAFSON,
THOMAS DAVID WILKERSON,
ROBERT WALTER GOVERN,
and LEON D. MAUSSER,

Defendants-Appellants.

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Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - - - - - - -

ORDER:

(X) The motion of the appellant, Robert Walter Govern for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of the appellant, Robert Walter Govern for [x] stay [ ] re-

call and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____

for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)